

CCASE:
ALBERT VIGNE V. GALL MINING
DDATE:
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TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ALBERT VIGNE,	DISCRIMINATION PROCEEDING
COMPLAINANT	
v.	Docket No. SE 84-2-DM
	MD 83-51
GALL SILICA MINING COMPANY,	
RESPONDENT	No. 2 Mine and Plant

DECISION

Appearances: Albert Vigne, Lake Wales, Florida, pro se;
Michael D. Malfitano, Esq., Macfarlane, Ferguson,
Allison & Kelly, Tampa, Florida, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Albert Vigne against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Vigne filed his initial complaint on June 8, 1983, with the Secretary of Labor, Mine Safety and Health Administration (MSHA), claiming that his discharge on or about April 29, 1983, as a supervisor of the drying plant was discriminatory in that it was based on "my concern for safety there and my cooperation with MSHA representatives." Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and Mr. Vigne filed his pro se complaint with this Commission.

Although both parties were provided with an opportunity to file post-hearing arguments, only the respondent did so. However, Mr. Vigne did file certain information concerning his contested unemployment compensation claim with the State of Florida, including copies of the findings of a State appeals referee who upheld his claim.

Issue

The critical issue in this case is whether Mr. Vigne's discharge was in any way prompted by his engaging in any protected activity under section 105(c) of the Act, or whether it resulted from differences with his superior regarding his work responsibilities.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 27001., et seq.

Testimony Presented by the Complainant

Albert Vigne testified that approximately six or seven months before his termination in April 1982, MSHA Inspector Gene Weaver made a "courtesy" inspection of the mine, and issued several memorandum "citations" regarding the lack of guards around several belts and chains. Mr. Vigne stated that he wrote up some work orders to correct the conditions pointed out by Inspector Weaver, and that he also advised Mr. Tony Haire, the plant supervisor, about the conditions in question (Tr. 8-13).

Mr. Vigne stated that he continued writing work orders for a period of five months, and that he wrote up five or six of them in an effort to correct the conditions brought to his attention by Inspector Weaver (Tr. 13). After Mr. Weaver's visit, MSHA Inspector Richardson visited the mine, and after finding that the conditions had not been corrected, he issued citations for a lack of guards on certain belts on the bagging machine belts and conveyors, and the belt on the second floor sand hopper (Tr. 17-18). The citations were not served on Mr. Vigne, and he did not know who they were served on. However, he believed that fines were served on the respondent as a result of the citations (Tr. 19).

Mr. Vigne stated that shortly after the citations were issued, Mr. Haire came to his work area and indicated that a large hopper outside the dry plant building needed painting. Mr. Vigne assigned some men to paint the hopper, but the next day, Mr. Haire returned to the area and informed Mr. Vigne that he wanted him to paint it. Mr. Vigne stated that he informed Mr. Haire that he was a supervisor and was not required to do manual labor. Mr. Haire informed him to "think it over" and left. The next day, Mr. Vigne informed Mr. Haire that he still objected to painting the hopper, and Mr. Haire put him on notice that he would be terminated in one week. When asked why Mr. Haire terminated him, Mr. Vigne replied as follows (Tr. 22-23):

Q. When Mr. Haire told you that he was going to give you one week's notice, is that the way he put it?

A. I'm going to give you one week's notice.

Q. Did you have any discussion with him as to the whys and the wherefores, or did you simply accept what he told you?

A. No, I knew that he wanted to get rid of me. That was evident.

Q. What made you believe that he wanted to get rid of you?

A. Just his attitude toward me.

Q. That day?

A. Not only that day, but other days also.

Q. What was his attitude toward you on other days?

A. Like he didn't really have any--didn't have any confidence in me, or just--I would say contemptuous attitude almost.

Mr. Vigne testified that at the time he was terminated, Mr. Haire made no mention of the MSHA inspections, and Mr. Vigne did not mention them (Tr. 25). Mr. Vigne also stated that he had never complained to any MSHA or state mine inspectors about any safety matters, and that he never complained to respondent's safety department (Tr. 26). He also confirmed that he never discussed such matters with Mr. Haire (Tr. 26).

Mr. Vigne stated that at the time of his discharge he was employed by the respondent as the drying plant supervisor, and that he was first hired in October 1977. His salary was \$235 a week, plus a company hospitalization plan to which he contributed, paid vacations, and a gas allowance (Tr. 28). No overtime pay was provided, and since his termination he has worked as a maintenance person in a mobile home park and for the Procter and Gamble Company (Tr. 29).

Mr. Vigne stated that he was not given any written termination notice and that Mr. Haire simply told him that "everybody is going to work" (Tr. 29). Mr. Vigne also confirmed that after a contest with the State of Florida, he received unemployment benefits (Tr. 30), and that he was currently employed at a mobile home park (Tr. 31).

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When asked why he believed he was discriminated against, Mr. Vigne replied as follows (Tr. 32; 35-36):

A. Well, I think that after Mr. Richardson came, I feel that I talked to him about some things that were going on around there other than, you know, the things that he wrote up. I feel that because of my conversation with him he was able to see other discrepancies, and I think Tony Haire realized this.

* * *

Q. Okay. Now, as a result of that conversation, what did Mr. Richardson do, or what could he have done that--

A. Well, I think that--

Q. Mr. Vigne, let me finish.

A. I'm sorry.

Q. That's okay. What could he do or what could he have done that would have caused some problems with mine management, which in turn would have caused some problems for you?

A. Well, I think he could have gone and looked in certain areas and caught things that he might not have caught before, and I'm sure that the people involved--through that, somebody had put a bug in his esr, so to speak.

Q. Did he do that, do you know?

A. I think he did. I mean, I didn't follow him around, but that's the impression that I got from comments that I heard.

Q. Would Mr. Haire have been--would Mr. Haire have been aware of your conversations?

A. He would have been probably the first one that was aware of it at the time, I would imagine.

Q. Why would that be?

A. Well, Mr. Haire is a very intelligent man, and I would say that Mr. Haire stays on top of everything. He and his people keep him informed about everything or else they don't remain his people.

Q. Well, let me ask you this, though. What specifically could Mr. Richardson have done that would have involved Mr. Haire as far as you were concerned?

A. Well, he could have gone--he could have come in at inopportune times. In other words, you know, you can pretty well say well, it's been six months since MSHA has been here, you know, we're going to kind of start looking for him. But let's say they were here yesterday and then they came back a week-and-a-half later, and that would surprise everybody.

Q. Did that happen, do you know?

A. I heard that it did after I left.

In response to questions from respondent's counsel, Mr. Vigne testified as to his duties as the dry plant supervisory foreman, and he confirmed that he has had no contact with MSHA Inspector Richardson since his termination (Tr. 40-44). He also confirmed that he did not inform Mr. Haire or Mr. Dibble about any of his conversations with Inspector Richardson (Tr. 44).

Mr. Vigne stated that Inspector Richardson would have issued the citations even if he (Vigne) had not discussed the work orders with him (Tr. 52). Regarding his own responsibility for the conditions which were cited by the inspector, Mr. Vigne testified as follows (Tr. 53-54):

Q. Were you with him during the inspection?

A. Yes.

Q. Did he point things out to you during the inspection that were violations of safety?

A. Yes. We had to move a ladder that was on the wrong side of the hopper or something.

Q. Now, as the foreman of the dry plant, and the person who is in complete charge of the plant, as you testified, were you aware of these violations before Mr. Richardson came in?

A. No, not all of them, because when you have two different inspectors, one inspector may look at something and not consider it unsafe, where another inspector would look at it and consider it unsafe.

I remember one time in the past there was a railing that stopped at the end of a catwalk and had been there for years, and nobody had ever said anything about it, but I don't remember which inspector it was, it might have been Richardson, but we had to have another piece on that railing. And that's dangerous, but nobody had ever said it was dangerous to me before.

Q. Did you consider it dangerous?

A. It would possibly be, you know.

Q. Did you ever make any effort to do anything about it?

A. Well, I never noticed it in that light until he called it to my attention; let's put it that way.

Q. But as a supervisor, you are in complete charge of safety for the dry plant; is that correct, or were--

A. Well, I would say as a supervisor, I think each supervisor is more or less responsible for safety in his own department.

Mr. Vigne conceded that his superior had criticized his work in the past, but he denied that he had ever been formally disciplined about his work (Tr. 59). He confirmed that he voluntarily left the respondent's employ for about two years, beginning in June 1979, but was asked to come back (Tr. 58-60).

Mr. Vigne stated that while Mr. Dibble mentioned a job in the scale house to him after he was terminated, he was not formally offered the job, and he conceded that he was not interested in the position. He denied that Mr. Haire ever mentioned that job to him, and he also denied that he turned down Mr. Haire's offer to work in the scale house (Tr. 63).

Testimony Presented by the Respondent

Anthony T. Haire, respondent's General Mine Superintendent, testified that he assumed supervisory authority over the dry plant on February 19, 1983, and that he discussed several problems with the plant operations with Mr. Vigne. These problems included closer supervision over the men, updating and cleaning the plant, and a desire to increase production. Mr. Haire stated he told Mr. Vigne that he should spend less time in his office and more time supervising and being with his men (Tr. 65-68).

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Mr. Haire stated that after his conversations with Mr. Vigne, his work performance did not improve, and production did not increase significantly. He had further discussions with Mr. Vigne, and when he visited the plant Mr. Haire found that men were engaging in horseplay, and that the plant was not kept clean, and broken bags of material were "strung around the plant" (Tr. 70). When asked about Mr. Vigne's reactions to his instructions, Mr. Haire stated as follows (Tr. 70-72):

A. Well, the favorite thing was that I'm not going to do any manual work. He said he was hired as a supervisor times, that Gall is a small operation, and that everybody works. I work with any department that needs me, if I got to get out there, and whatever it takes to get something done, I do it.

Q. You do physical labor?

A. Yes, I do.

Q. Do any of the other department foremen do physical labor?

A. Yes, they do.

* * *

Q. When you had these early conversations with Mr. Vigne right after you took over, did you explain to him that you wanted him to be a working foreman like your other foremen?

A. I didn't actually tell him to get over there and get with it, you know, I mean if the manpower is there to do the job, if all his help is there in a day's time, then there is no need for him to actually get over there and do bodily labor, no.

But I expected him to be there, you know, walk through every once in a while and check and make sure that work is being done properly.

Q. And he wasn't doing that?

A. No, he was--he would go over there, yes, but once or twice a day. And that's quite a long time when you got production to get out.

Q. And he wasn't doing that?

A. No, he was--he would go over there, yes, but once or twice a day. And that's quite a long time when you got production to get out.

Q. Okay.

A. But if men would not show up we would have a tardy--I'm shorthanded, I can't get much today, which that was no good for production because like I way, we're small people. If need be, I can try to pull a person from another department to fill in if I can, but I can't always do that.

Q. So if Mr. Vigne was shorthanded he didn't pitch in and help?

A. No, sir.

Q. Did production suffer as a result of that?

A. Yes, sir, it did.

Mr. Haire confirmed that he asked Mr. Vigne to paint the legs of the hopper silo, and that he did so after finding him on numerous occasions sitting in his office reading books (Tr. 75). Mr. Haire stated that Mr. Vigne refused to do any painting because "he figured he was above it" (Tr. 75). Mr. Haire stated that Mr. Vigne's refusal to paint was not the cause for his termination, and that he was terminated because of low production, his inability to get his men to work and get the work done (Tr. 75).

Mr. Haire stated that Mr. Vigne's prior supervisor, Charlie Meadows, disciplined him for poor supervision. Mr. Haire identified exhibit R-1, as a May 29, 1979, document which was placed in Mr. Vigne's personnel file, and he indicated that it instructed Mr. Vigne as to how to perform his job "step-by-step" (Tr. 76).

Mr. Haire confirmed that MSHA conducted an inspection at the dry plant, beginning on March 2, 1983, and that 12 out of 13 total citations concerned conditions in the dry plant. Two citations were guarding citations for which civil penalties were assessed. Mr. Haire indicated that he shut the operation down, and that all of the citations were abated within eight hours (Tr. 86-87).

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Mr. Haire confirmed that Mr. Vigne had submitted "work orders" for the two guarding citations, but that he had not submitted any for the conditions cited in the other 10 citations, nor had he brought these conditions to his attention, or to the attention of anyone else (Tr. 88). Mr. Haire stated that Mr. Vigne was not required to submit any work orders to correct the conditions cited as guarding violations, and that he had the authority to get a welder to do the work (Tr. 89-90). Mr. Haire denied that Mr. Vigne was terminated because he issued work orders pertaining to the guards, or because he informed Inspector Richardson of this fact (Tr. 90-91). He also denied that the inspection had anything to do with Mr. Vigne's termination (Tr. 91).

Mr. Haire stated that after he informed Mr. Vigne that he was to be terminated, he offered him a job in the scale house, but Mr. Vigne refused it. Mr. Haire also indicated that he tried to get him a job in a hardware store operated by the respondent, but there were no openings (Tr. 93).

Mr. Haire stated that he has never met Inspector Weaver, but that he does know Inspector Richardson (Tr. 120). He confirmed that when he terminated Mr. Vigne he did not discuss the MSHA citations with him, nor did he mention that he was displeased with the fact that the citations may have resulted from Mr. Vigne's shortcomings (Tr. 125).

Mr. Haire confirmed that Mr. Vigne did not contact Inspector Richardson to come to the plant to conduct an inspection (Tr. 127). Mr. Haire also confirmed that he was with Inspector Richardson at the time the citations issued, and that Mr. Vigne was also present (Tr. 129).

Mr. Haire stated that Mr. Vigne was not given any written notice of termination, and that the offer made to him for the scale house job would not have been a significant reduction in pay (Tr. 133-134).

Donald R. Bridges, respondent's Dry Plant Foreman, testified as to his duties and responsibilities, and he stated that when he was operating the scales two truck drivers complained to him that there was not enough sand ready for loading and that this was Mr. Vigne's responsibility (Tr. 137-141). He also indicated that when he was the dry plant foreman, he had the authority to fix any equipment which posed a safety problem without writing a work order (Tr. 141).

On cross-examination, Mr. Bridges conceded that there were times when Mr. Vigne requested a loader that he had

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to wait at least 40 minutes for this service (Tr. 143). Mr. Bridges denied that he ever threatened Mr. Vigne with harm if he complained to Mr. Dibble about the lack of a loader (Tr. 143-144).

Mr. Vigne was recalled as the Court's witness, and he confirmed that Mr. Haire never held him personally accountable for the citations which were issued by Inspector Richardson and that he (Vigne) never complained to Mr. Richardson, but simply showed him the work orders which he had submitted for the abatement work to be done (Tr. 149). He also confirmed that at no time did he contact MSHA to complain about any of the conditions which resulted in the issuance of the citations (Tr. 150).

Mr. Vigne examined his "Personnel Envelope File" which was produced by the respondent's counsel, and he confirmed that it was in fact his personnel file maintained by the respondent. He confirmed that in connection with an unemployment compensation claim which he filed when he left the respondent's employ in 1979, he indicated that he quit his job because of a salary dispute with his supervisor, and that this was true (Tr. 150-152).

With regard to his unemployment compensation claim which he filed in connection with his May 6, 1983, termination, Mr. Vigne confirmed the accuracy of a statement on a form completed by the respondent that he was discharged because of a "disagreement over job duties" with his "new supervisor." He also confirmed that the disagreement concerned Mr. Haire's desire that he perform "labor tasks" and his (Vigne's) disagreement over this issue (Tr. 154). Mr. Vigne also confirmed the accuracy of the following statement which was included on the form submitted by the respondent in connection with his unemployment compensation claim (Tr. 155):

While under new supervision, Mr. Vigne was instructed on the new routine to be maintained at the drying processing plant. He failed to comply with these instructions and would not work as a laborer, since he was hired as the foreman. After this conversation he was asked to terminate his employment.

Mr. Vigne confirmed that the aforesaid characterization of the circumstances under which he was terminated were accurate (Tr. 157), and he reiterated that he did not believe that Mr. Haire was aware of the fact that he had spoken to Inspector Richardson about the citations which he issued (Tr. 172).

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The information provided by Mr. Vigne in connection with his unemployment claim, reflects an initial determination made by a claims adjudicator on May 27, 1983, in which it was found that Mr. Vigne was discharged "for failure to comply with supervisory instructions." The adjudicator concluded that this amounted to "misconduct connected with work," which disqualified Mr. Vigne from receiving unemployment benefits.

On appeal of the adjudicator's decision, the referee reversed the adjudicator's determination, and ruled that Mr. Vigne's refusal to do manual work, as directed to by his supervisor, was justified. The referee found that since Mr. Vigne had been doing supervisory work in the past, it was unreasonable to expect him to do manual labor at hourly wages, and that since this was tantamount to a "demotion," Mr. Vigne had good cause to refuse his supervisor. Accordingly, while the referee found that Mr. Vigne had in fact been discharged, he ruled that the discharge was not "for misconduct connected with his work," and he reversed the adjudicator's conclusion in this regard.

Respondent produced copies of two documents filed in connection with unemployment compensation claims filed by Mr. Vigne while employed with the respondent. One document is the form completed at the time Mr. Vigne applied for benefits when he was terminated in May 1983 (Tr. 154-155). The form contains a statement by Mr. Vigne that he was discharged because "new supervisor and I had disagreement over job duties." The second document is a State of Florida Notice of Claims Determination, dated June 28, 1979, which advises Mr. Vigne that he is disqualified for certain unemployment because he quit his job because of a conflict with his supervisor, and that his quitting was without good cause attributable to his employer.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co. v. Marshall, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by

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showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this matter it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Maga Copper Co. 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983); and Donovan v. Stafford Construction Co., Nos. 83-1566, D.C.Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., --- U.S. ----, 76 L.Ed.2d 667 (1983).

On the facts presented in this proceeding, I cannot conclude that there is any credible evidence to suggest or support any theory that Mr. Vigne's discharge was in any way connected with any protected activity on his part. There is no evidence of any protected work refusals or retaliation for such activity, nor is there any evidence that Mr. Vigne made any safety complaints to mine management, to MSHA, or to any state or local mining authorities. The thrust of Mr. Vigne's case seems to be that when an MSHA inspector inspected the mine following a previous "courtesy visit" by another inspector, Mr. Vigne "cooperated" with the inspector, and pointed out certain safety infractions to him. In addition, Mr. Vigne asserted that when questioned by the inspector as to why the cited conditions had not been corrected, Mr. Vigne advised him that he had submitted certain "work orders" to correct the conditions, but had been unsuccessful. After the inspector issued certain citations charging the respondent with several violations, Mr. Vigne suggests that Mr. Haire was somehow offended, and retaliated by firing him.

Mr. Vigne conceded that at the time he was informed that he was going to be fired, there were no discussions about any MSHA inspections, and Mr. Haire never mentioned them. Mr. Vigne also conceded that even if he had not mentioned the work orders, Inspector Richardson would have issued the citations anyway. Given the fact that the conditions which prompted the citations issued by Inspector Richardson were

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initially discovered by Inspector Weaver and called to Mr. Vigne's attention, I cannot conclude that Mr. Vigne was cast in the role as the one who initiated the inspection or that his complaints prompted the issuance of the citations. Since Mr. Vigne was the supervisor responsible for the area where some of the conditions were cited, I believe it was only natural for him to attempt to mitigate his own responsibility for the conditions by bringing the work orders to the attention of the Inspector. Mr. Haire testified that he was aware of only two work orders concerning equipment guards, and he denied ny knowledge of other work orders submitted by Mr. Vigne, and indicated that Mr. Vigne never discussed them with him. Mr. Vigne admitted that he never mentioned any of his conversations with Inspector Richardson to Mr. Haire or others in mine management, and he admitted that as a supervisor, he had a responsibility for safety conditions in those area under his supervision.

The record in this case strongly suggests that Mr. Vigne and certain individuals in mine management did not get along too well. Mr. Vigne conceded that his work had been the subject of past criticism by a superior, and while he indicated that he left the respondent's employ voluntarily on a previous occasion and was then asked to return, the fact is that he was gone for approximately two years and that his departure came after some conflict with his supervisor.

With regard to Mr. Vigne's termination in April 1983, I find nothing here to support a conclusion that Mr. Vigne was fired for exercising any protected safety rights. Having viewed Mr. Vigne and Mr. Haire during the course of their testimony in this case, including their demeanor and temperment, I am clearly convinced that they have a personal dislike for each other. I am also convinced that Mr. Haire was not too enchanted with Mr. Vigne's work performance and attitude toward his work when he assumed supervisory responsibilities over him. I am also convinced that Mr. Vigne resented Mr. Haire's supervisory authority, and resisted efforts by Mr. Haire to assign work to him which Mr. Vigne found demeaning to his status as a supervisor. Although Mr. Vigne may have been justified in resisting Mr. Haire's attempts to assign him other work, that is a matter best left to mine management. Since Mr. Vigne was a supervisor and part of mine management, and absent any evidence that any protected rights under the Mine Act have been violated, I believe that any difficulties encountered by Mr. Vigne with an upper echelon supervisor of this rather small company is a private matter best left for resolution by those parties.

I take particular note of Mr. Vigne's testimony concerning the circumstances surrounding the discharge in issue in this case. In a statement attributed to Mr. Vigne which appears on a state unemployment compensation form, he purportedly stated that "new supervisor and I had disagreement over job duties," and that this was the reason he gave for his discharge. During the hearing, Mr. Vigne acknowledged the accuracy of this statement, as well as another statement indicating that his discharge resulted from his failure to comply with instructions from his supervisor over work assignments. In both instances, Mr. Vigne admitted that the supervisor in question was Mr. Haire. Under the circumstances, these admissions by Mr. Vigne, made shortly after his discharge, strongly support the conclusion that his discharge was prompted by his inability to get along with Mr. Haire, and his failure to follow Mr. Haire's instructions and orders concerning his work.

The fact that Mr. Vigne ultimately prevailed on his claim for unemployment compensation before the State of Florida is not relevant in this case before me. Although the unemployment referee concluded that Mr. Vigne's refusal to follow Mr. Haire's instructions concerning his work did not amount to "misconduct" for purposes of disqualifying him for benefits, his conclusion in this regard is not controlling to the facts presented in the case before me. The issue before me is whether Mr. Vigne's discharge was in any way connected with or prompted by, the exercise of any protected safety rights he had under the Federal mine safety and health law. I have concluded that it was not.

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the complainant here was failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge